UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

GEORGE GUINDON, ET AL	:	
	:	
VS.	:	C.A. No. 03-335L
	:	
JEFFREY DERDERIAN; MICHAEL DERDERIAN; DERCO, LLC, ET AL	:	

MOTION TO STAY

Now come the defendants, Jeffrey Derderian, Michael Derderian, and Derco, d/b/a The Station, and move this Honorable Court for a stay of the instant action against them, including the filing of an answer to the plaintiffs' complaint. The grounds for the defendant's motion are more completely set forth in the accompanying memorandum of law. Therefore, the defendants, Jeffrey Derderian, Michael Derderian, and Derco, d/b/a The Station, respectfully request a stay through January 31, 2005 of the requirement that they answer the plaintiffs' complaint and of discovery to them. Defendants would further request, in the event their motion to stay is denied, that they be permitted to file an answer within thirty (30) days of this court's order denying their motion.

JEFFREY DERDERIAN, MICHAEL
DERDERIAN and DERCO, d/b/a THE STATION,
By their attorney,

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Rachel Aborne [signature]

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MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STAY

The plaintiffs have filed a complaint seeking damages from inter alia, Jeffrey Derderian, Michael Derderian, and Derco, arising out of the fire that occurred at The Station Nightclub on February 20, 2003. The defendants now seek a stay of these civil proceedings based upon the fact that there are criminal indictments pending with respect to the same incident. Indictments have been returned against the defendants, Jeffrey Derderian and Michael Derderian, in the Rhode Island Superior Court charging them with involuntary manslaughter arising from the fire that occurred on February 20, 2003. It is well settled that a district court may stay civil proceedings pending the outcome of parallel criminal proceedings. *See Federal Savings and Loan Insurance Corporation v. Molinaro*, 889 F.2d 899, 902 (9th Cir. 1989), *citing United States v. Kordel*, 90 S.Ct. 763 (1970).

To determine whether a stay is appropriate, the court must weigh the circumstances and competing interests involved in the case, including the extent to which the defendant's Fifth Amendment rights are implicated. *Id.* The defendants' Fifth Amendment rights are applicable not only during discovery but also at the pleading stage of the litigation. *See North River Ins. Co., Inc. v. Stefanou*, 831 F.2d 484, 486 (4th Cir. 1987). Because considerations of the defendants' Fifth Amendment rights are equally implicated in answering the plaintiffs' amended complaint and in responding to discovery, defendants respectfully request that this Honorable Court stay the requirement that the defendants answer the plaintiffs' complaint and stay any discovery with respect to the defendants.

Recently, the Supreme Court of Alabama issued an opinion giving an exhaustive and thorough analysis of the factors to be weighed by the court in considering whether a stay should be entered in a civil case while a parallel criminal prosecution is pending. *See Ex parte Bernard J. Ebbers*, 871 So.2d 776 (Ala. 2003). The factors to be considered outlined by the Alabama Supreme Court have also been identified in federal cases were:

1. The interest of the plaintiff in proceeding expeditiously with the civil litigation, or any particular aspect of it, and the potential prejudice to the plaintiff of the delay in the progress of that litigation.

2. The private interests of the defendant and the burden that any particular aspect of the proceedings may impose on the defendant.

3. The extent to which the defendant's Fifth Amendment rights are implicated/the extent to which the issues in the criminal case overlap those in the civil case.

4. The convenience of the court in management of its cases and the efficient use of judicial resources.

5. The interests of persons not parties to the civil litigation.

6. The interest of the public in the pending civil or criminal litigation.

7. The status of the criminal case, including whether the party moving for stay has been indicted; and

8. The timing of the motion to stay. *See Ebbers*, 871 So.2d at 789-90 (citations omitted).

With respect to the first factor granting a stay with respect to the Derderians and Derco will not impact the plaintiffs proceeding against other defendants in the case, nor will it interfere with the court's consideration of other legal issues that have been raised by co-defendants by way of motions to dismiss. Granting the requested stay will not delay the progress of the instant litigation due to the multitude of legal and factual issues to be addressed that do not involve the Derderians or Derco.

Also, upon information and belief, the Rhode Island Superior Court has granted plaintiffs' counsel access to some of the exhibits utilized in the Grand Jury proceedings and transcripts of certain witnesses' testimony. This will allow plaintiffs to continue to prosecute the civil litigation and minimize any prejudice that may result from a delay in the filing of responsive pleadings by the Derderians and Derco and in the service of discovery directed to them.

The greatest burden upon the Derderians and Derco by allowing the litigation to go forward against them while the criminal charges are pending would be requiring them to assert their Fifth Amendment right against self-incrimination. It is clear that in response to the plaintiffs' amended complaint and any discovery that might be propounded to them, the Derderians would assert their Fifth Amendment rights. Once those Fifth Amendment rights have been asserted, the plaintiffs will undoubtedly argue that an adverse inference should be drawn against the defendants for their refusal to answer. *See Pulawski v. Pulawski*, 463 A.2d 151, 156 (R.I. 1983) quoting *Baxter v. Palmigiano*, 96 S.Ct. 1551, 1558 (1976). The Supreme Court of Alabama in *Ebbers* discusses such burden in support of its decision to grant the stay that was requested by the defendant.

Similarly, in the instant action requiring that the defendants assert their Fifth Amendment right against self-incrimination places an unnecessary burden upon them. The issues implicated in the criminal indictment and the civil action overlap so greatly that the defendant's Fifth Amendment rights are greatly implicated.

As set forth previously, with respect to the first consideration of the interests of the plaintiff, similarly the convenience of the court in management of this case would not be adversely impacted by granting the requested stay. The court could continue to address the legal issues that have been raised by other defendants in their motions to dismiss and other legal and factual issues that will undoubtedly arise during the course of the litigation.

Although the Derderians have been indicted and the criminal proceedings have been assigned to be managed by Superior Court Associate Justice Darrigan, no trial date has yet been set. Therefore, the defendants request that a stay be issued of these proceedings through January 30, 2005 and at that point, the court and parties can revisit the continuation of the stay based upon the status of the criminal proceeding.

Respectfully submitted,

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